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Abstracts and Notes

In addition, because the purpose of the statutes is the removal of a nuisance that is injurious to the health, safety and morals of the community these statutes have been held to be a lawful exercise of the police power.[73] Furthermore, the statutes do not punish for a crime, but provide for a civil suit in equity to abate a public nuisance.[74] Therefore, since no right to a trial by jury existed in equity prior to the adoption of the United States Constitution, there is no violation of the constitutional guarantee to a trial by jury, unless the scope of this right has been enlarged by the state constitution.[75] Thus, as long as the normal procedures for suits in equity are followed, no constitutional rights of the defendant are violated.

Conclusion

The powers of a court of equity can be used effectively to eliminate those forms of organized vice whose existence depends upon the patronage of the public and the use of a specific piece of real property. Property owners, whose ignorance might have saved them from a criminal prosecution, are quick to take action when an injunction makes them responsible for the activities of their tenants. Furthermore, where a statute provides for the issuance of a closing order or for the removal and sale of furniture and fixtures, the possibility of a loss of income is a strong inducement for the owner to diligently inquire into the motives of a prospective tenant and to police his premises after they have been leased.[76] In addition, the operators of the illegal business, who may have circumvented the criminal laws, may be either forced to abandon their base of operations or punished for a violation of the decree.

The powers of a court of equity to abate gambling and prostitution as public nuisances are co-extensive with the broad powers of the state to protect the general welfare of its citizens. However, some courts refuse equitable relief where no injury to property is involved because of the lack of precedent and their desire to preserve for the defendant the procedural safeguards of the criminal processes. The argument of the lack of precedent has been shown to be based upon an erroneous interpretation of early English cases.

The argument that a defendant is entitled to the benefits of the criminal procedures is based upon the theory that enjoining a nuisance which happens to be a crime is the equivalent of punishing for a crime. This theory is at best questionable. It overlooks the fact that a court of equity, in issuing an injunction, neither punishes the defendant for his past criminal activities nor infringes upon the jurisdiction of the criminal courts; it is only exercising an historical function of restraining a use of property which is harmful to the public. The defendant who is enjoined from operating a brothel or gambling house that corrupts the morals of the community is not being punished anymore than one who is enjoined from operating a legitimate business in a manner that interferes with the use and enjoyment of his neighbor's property.

Casa Co.; 35 Cal. App. 194, 169 Pac. 454 (1917); *People v. Smith*, 275 Ill. 256, 114 N.E. 31 (1916).

[73] See *People v. Barbiere*, 33 Cal. App. 770, 166 Pac. 812 (1917); *People v. Smith*, 275 Ill. 256, 114 N.E. 31 (1916).

[74] ". . . . (T)he remedy in equity is purely preventative. The chancellor does not punish the defendant for what he has done. This is left to the criminal courts. . . . The judgement merely deals with the use of the property in question. . . . The court of chancery will not restrain personal conduct, but it will restrain the unlawful use of property." *Respass v. Commonwealth*, 131 Ky. 807, 115 S.W. 1131, 1132 (1909) (gambling house).

[75] See *Mugler v. Kansas*, 123 U.S. 623 (1887) and cases cited in note 66, *supra*.

[76] For a report of the success of the Louisiana statute in suppressing prostitution see District Attorney, Parish of Orleans, Special Report. (Jan. 15, 1956).

ABSTRACTS OF RECENT CASES

Failure to Exhaust State Remedies Does Not Bar Appeal to Federal Courts When Due Solely to Lack of Finances—After two fruitless attacks on a New York conviction, the defendant applied for a writ of error *coram nobis* with the New York Supreme Court. This was denied without a hearing and the defendant filed a timely appeal with the Appellate Division of that court, and petitioned for leave to appeal *in forma pauperis*. Even though the defendant's allegation that he had no money with which to pay required fees was not challenged, the petition was denied. In addition, the Court of Appeals, the highest New York state court, had no jurisdiction to review the denial of a petition to appeal *in forma pauperis*. The defendant later applied to the Supreme Court of the United States

for a writ of certiorari, which was denied, and then his petition to the United States District Court was denied on the ground that he had not exhausted his state remedies. The United States Court of Appeals reversed the latter and held that appeal to the federal courts can be made when possible state remedies are beyond the grasp of a prisoner because he does not have the finances with which to pursue them. *United States v. Fay*, 247 F.2d 662 (2nd Cir. 1957)

The United States Court of Appeals was informed by the appellee that it was the practice of the Appellate Division to refuse a petition to appeal *in forma pauperis* if it seemed that the appeal itself was without merit, even though the petitioner was in fact a pauper. Thus, since there was no challenge to the defendant's allegation that he was a pauper, the court concluded that the Appellate Division had decided the defendant's case on its merits, yet expressed its decision by denying the defendant's petition to appeal *in forma pauperis*. Such a decision could not be appealed to the New York Court of Appeals because the granting of such a petition was within the discretion of the Appellate Division. A formal decision on the merits of the defendant's appeal was not possible because he could not pay the required fees. The court looked to section 2254 of 28 U.S.C.A. which states that relief may be sought in the federal courts when state remedies have been exhausted or "there is the existence of circumstances rendering such processes ineffective to protect the rights of the prisoner." The court stated that "section 2254 does not deprive a prisoner of access to the federal courts where his failure to exhaust state remedies is due solely to his financial inability to do so." Although the court had previously held to the contrary, it commented that such a position was probably unconstitutional in the light of recent Supreme Court decisions.

Due Process not Violated by Failure of Court to Explain Plea of Guilty to Defendant When He Is Represented by Counsel—After the defendant was charged with assault to commit great bodily harm, he requested and received court appointed counsel. The court then granted the defendant's request for a one week continuance "for the purpose of entering a plea." At the end of that time, the defendant entered the plea of guilty, and he was subsequently sentenced for the term prescribed by law. The trial court record indicates that at no time did the trial judge explain to the defendant the effect and meaning of his plea of guilty. The California District Court of Appeal affirmed the conviction and held that the defendant's right to due process under both the California and United States Constitutions was not denied since he was adequately represented by counsel and understood the consequences of his plea of guilty. *People v. Martinez*, 316 P.2d 14 (1st Dist. Cal. 1957).

The defendant contended that the failure of the trial judge to explain his plea of guilty was a denial of due process. This presented a novel question, and thus the court looked to the specific circumstances of the case. The court considered highly significant the factor that the defendant was represented by adequate counsel, and that a continuance had been granted for the express purpose of formulating a plea, which culminated in the plea of guilty. The court also noted that the defendant had been tried on three other occasions, and that this is a proper consideration in ascertaining that he was aware of the consequences of his guilty plea. The court concluded that the "facts and circumstances" of the case placed no duty upon the trial judge to explain the effect and meaning of the plea of guilty to the defendant, but stated that under other facts and circumstances such a duty might exist. The court made no distinction between the due process requirements of the State of California and United States Constitutions.

(*For other recent case abstracts see "Police Science Legal Abstracts and Notes", infra pp. 668–670*).

ABSTRACTS AND NOTES

"OBSCENITY AND THE LAW"

To the Editor:

In Vol. 48, No. 3, September–October, 1957, of this Journal, there appeared an article by Henry H. Foster, Jr., Professor of Law, University of Pittsburgh, entitled, "The 'Comstock Load'—Obscenity and the Law;" Foster points out the dilemma besetting the law in its attempt to shield society from obscenity, i.e., one can go far, even too far, in thought control and on the other hand, one must heed the established principle in criminal law to intercede only with overt conduct.

Whatever the causal connection of obscenity with criminal conduct may be, the difficulty would be eased if we basically knew what obscenity is.

Within our society as well as in practically all civilized nations the moral obligation is felt to protect the growing human plant and sexual immaturity at any age. In this Journal, Vol. 45, No. 3, 1954 and Vol. 47, No. 4, 1956, it was shown that there is a criterion by which to judge immature sexuality. This criterion was defined according to Freud's concept of the development of sexuality, published in 1905. The application of the criterion of pornography was shown and a number of verifiable concrete factors were outlined. The criterion applies irrespective of the problem whether or not any causal relation exists between pornography and otherwise objectionable conduct. My papers were quoted in the Modern Penal Code, Tentative Draft No. 6, May 6, 1957 of The American Law Institute, pp 32 and 43.

Instead of familiarizing themselves with these facts, jurists, sociologists and others continue doing learned work which consists in rehashing again and again what Coke, Hale, Blackstone and other prehistoric and historic authorities have said. "Prehistory" in this field extends to the latest decision of the Supreme Court of The United States in which the new adjective, "purient," was added to the venerable array of adjectives used in former centuries such as "salacious," "lewd," "lurid," etc. (more adjectives can be found in the articles in "Obscenity and the Arts," *Law and Contemporary Problems*, Vol. XX, No. 4, Autumn, 1955). It is a paradox worth noting that those who feel professionally antagonized by obscenity use the same array of adjectives without substance as do the pornographers themselves.

How long will lawyers go on limiting themselves to mere historical descriptions of the futile attempts to deal with the real problem!

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To the Editor:

I cannot accept Dr. Eliasberg's anthropomorphic conception of Freud nor his evangelical certitude that an esoteric definition of pornography eliminates all of the problems pertaining to obscenity. From my point of view, which may be blurred, things are not black or white, but gray. His "criterion" for recognition of an appeal to sexual immaturity seem amorphous and inevitably subjective. I do not regard them as "facts." I agree that there may be a felt moral obligation "to protect the growing human plant and sexual immaturity at any age" but am impertinent enough to ask: "From what?" I also suspect that if Dr. Eliasberg gave a careful look he might find a sadistic element back of the "moral obligation."

It is true that the drafters of the Model Penal Code cite one of Dr. Eliasberg's articles along with others by Karpman and Mead. But after citing different definitions of obscenity, the following conclusion is reached: "However, although psychiatry in general gives insight into the significance of obscenity, the legal definition of obscenity cannot incorporate any specific psychiatric formulation, first, because *there is no psychiatric concensus*, and second because *the legal test must be one reasonably within the power of ordinary citizens to understand, and of policemen and courts to apply*" (emphasis supplied). Thus, after mature deliberation, the drafters rejected Dr. Eliasberg's magic formula due to the disagreement among experts and because it was believed unworkable.

In answer to the query "How long will lawyers go on limiting themselves to mere historical descriptions of the futile attempts to deal with the

real problem," all I can say is, I hope only so long as we are forced to do so due to the lack of cogent sociological and psychological data. There is a great need for a thorough and scholarly study of the causal relation, if any, between so-called obscenity and misconduct. That is the problem which many of us feel should be explored by our psychiatrist friends such as Dr. Eliasberg. We await their findings, and until they are received, I suspect we'll go along with our own inadequate definitions and continue our historical and sometimes analytical studies.

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International Congress on Social Defence—The Fifth International Congress on Social Defence will be held in Stockholm, August 25–30, 1958. The Fourth Congress was held at Milan in 1956. At that time the International Society for Social Defence received an invitation from the Swedish Minister of Justice to arrange to hold its Fifth Congress in 1958 in Stockholm. The council of the society has chosen as its subject: "Intervention, by the courts or by other authorities, in the case of socially maladjusted children and juveniles."

In choosing this topic for discussion, the Society is continuing the studies entered upon at the Fourth Congress. During the first three congresses the general principles of social defence were discussed, and the outcome of this was the adoption of a basic programme. At the fourth congress a study of more specific issues was initiated and the principles of social defence, that the Society intends to uphold, were applied to definite situations and practical problems.

The topic chosen is undoubtedly one of very great importance both from a practical and a theoretical point of view. In nearly all countries the problems concerning juvenile delinquency are becoming steadily more acute. At their First Congress in Geneva in 1955 to discuss the prevention of crime and the treatment of offenders, the United Nations very properly included on their agenda a debate upon the prevention of juvenile delinquency. However, since the discussions in Geneva had to be kept within certain limits, the question as to the measures to be taken when an asocial act has been committed had to be postponed. Hence it seems appropriate that an international congress should now study this problem.

The vital importance of these issues has prompted the choice of a topic for the Fifth International Congress on Social Defence, which provides opportunities to exchange opinions upon the manner in which public authorities should intervene when the behaviour of a minor calls for their intervention.

In formulating the topic, the council has avoided limiting it to the cases where a minor has committed an offence or an act which would have been regarded as an offence if it has been committed by an adult. As the following comments will make clear, one issue to be studied is, in fact, whether it is desirable and, if so, to what extent, to restrict the interference of the authorities to cases of misbehaviour of this nature, with regard to persons under a certain age.

The topic chosen for the congress involves a whole series of problems; since, however, it is necessary that the congress should be able to reach conclusions within the limited time that will be at its disposal, the following three aspects of the subject have been singled out for particular attention.

1. STAGES IN THE DEVELOPMENT OF SOCIALLY MALADJUSTED MINORS

It seems suitable to discuss first of all the extent to which special provisions should be made regarding minors when a system of social protection is being drawn up.

It is necessary to examine whether it is desirable to lay down an age limit below which young children should be free from intervention by public authorities. Furthermore the discussion should take up the question of an upper age limit above which the special measures for young persons should not be applicable, and of an age limit for the imposition of penalties or other measures proper to the ordinary administration of justice.

It follows that the concept of criminal responsibility must be discussed. There is a tendency at the present day to do away with the concept of discernment in favour of a classification by age groups referring to the need of measures for rehabilitation and reassessment. This attitude gives rise to the question whether it is not convenient to examine separately for each measure its appropriate application. The consequences of this view for the concept of criminal responsibility should be considered. The question arises whether the concept of a legal age of majority in criminal matters ought to be maintained.